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No.

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In The

Supreme Court of the United States

October Term, 1997

VINCENT C. PIANO, a/k/a Vic Piano
and LOUISE PIANO,

Petitioners,

vs.

ALBERT F. NASUTI, Trustee,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Does an owner of property have a constitutionally guaranteed right to dispose of any part or all of his possessions, either gratuitously or otherwise, at a time when he is not obligated to another and when he has no known or anticipated future creditors.

2. Under New York law, may subsequent indebtedness be invoked to make that fraudulent which was honest and free from impeachment at the time of the transfer.

3. Under New York law must there be definite proof that creditors existed who were able to be defrauded at the time of a conveyance in order to establish that a conveyance was in fraud of creditors.

4. Under New York law, is a transfer fraudulent as to future creditors, where at time of a gift of his property to his wife, husband has no creditors, and no knowledge as to the identity of any future creditor.

PARTIES TO THE PROCEEDING

The parties named in the caption are the only parties before the Court of Appeals, District Court and Bankruptcy Court below.

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Petitioners, Vincent C. Piano and Louise Piano (the "Piano's") respectfully request that a writ of certioriari be issued to review the judgment of the United States Court of Appeals for the Eleventh Circuit in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eleventh Circuit, in *Piano et al. v. Nasuti*, Appeal Case No. 97-9164 is not published but is attached as App. A. The opinion of the United States District Court for the Northern District of Georgia in *Piano, et al. v. Nasuti*, Civ. No. 2:96-cv-086-WCO is not published but is attached as App. B. The opinion of the United States Bankruptcy Court for the Northern District of Georgia, in *Nasuti v. Piano, et al.*, Case No. G-94-20539-REB is not published but is attached at App. C.

STATEMENT OF JURISDICTION

The Judgment of the United States Court of Appeals for the Eleventh Circuit ("Court of Appeals") was entered on June 8, 1998.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides in relevant part: "No person shall . . . be deprived of life, liberty, or property, without due process of law. . . ."

The bankruptcy court determined that there was a fraudulent conveyance pursuant to § 276, New York Debtor and Creditor Law which states as follows:

> Every Conveyance made and every obligation incurred with actual intent, as distinguished from the intent presumed in law, to hinder, delay, or defraud either present or future creditors, is fraudulent as to both present and future creditors.

§ 276 New York Debtor and Creditor Law, McKinley's.

STATEMENT OF THE CASE

This is an action springing from an adversary complaint in a Chapter 7 bankruptcy proceeding in which the Trustee alleges, inter alia, that certain transfers of real and personal property made by Mr. Piano to his wife were fraudulent under the United States Bankruptcy Code and New York Debtor and Creditor Law, specifically § 276 of New York Debtor and Creditor Law.

The primary issue is whether an owner is entirely at liberty to dispose of any part or all of his possessions, either gratuitously or otherwise, at a time when he is not obligated to another and at a time when any such transfer is not subject to question from any source. The notion of fraud as to a future creditor is one peculiar to New York law, and relies upon a finding of actual intent to defraud, hinder or delay a creditor.

Petitioner contends that under New York law, subsequent indebtedness cannot be invoked to make that fraudulent which was honest and free from impeachment at the time, and that the bankruptcy court committed error in ignoring the complete lack of debt of the debtor at the time of the transfer, as well as the debtor's complete lack of knowledge of the identity of any future creditor.

Finally, when the bankruptcy court initially announced its decision it did so in language which demonstrates a reluctance to

find fraud and an admission that the debtor had no way of knowing the identity of the future creditor. Consequently Petitioner contents that although the bankruptcy court's decision recites that it was based upon clear and convincing evidence, in actuality the findings announced by the bankruptcy court were far short of the standard, and contrary to the standard of clear and convincing evidence required by New York law.

A. Statement of the Facts

In November, 1990, Vincent Piano transferred his one half interest in the family home in New York to his wife Louise Piano. (R. at 172.) At the time he was 68 years old, (R. at 64) had no debts, (R. at 636) had no foreseeable future debts, (R. at 636) received a salary in excess of $10,000 per month, (R. at 85) and held 500,000 shares (R. at 86) in a publicly traded company which were being traded in a range of $.75 and $.32 per share during the month. (R. at 453 and 483). The transfer of his one half interest has been alleged to be a conveyance to defraud his creditors, solely because a debt was retroactively created in March, 1994 and backdated to March, 1990. (R. at 634, l. 22 and R. at 637, l. 21.) The fraudulent conveyance allegations were made for the first time in 1995, and flowed from actions taken in June, 1993 by the trustee in the bankruptcy case of Mizlou Communications, Inc. ("Mizlou"). (Plaintiff's Trial Exhibit 17 identified R. at 547 admitted R. at 547.) In February, 1990, Mr. Piano loaned Mizlou $125,000 for a period of three weeks. (R. at 634, l. 22 and R. at 637, l. 21.) The repayment was found to be a preference since Mr. Piano was an insider by virtue of his 6.97% interest in the company at the time. (Plaintiff's Trial Exhibit 17 identified R. at 547 admitted R. at 547.) The only creditor in this case is the New York Trustee Issac Nutovic who obtained a judgment in the amount of $125,384.23 principal plus interest of $45,138.32. (Plaintiff's Trial Exhibit 78 identified R. at 336 admitted R. at 338.) There are no other creditors.

In June, 1993, the United States Bankruptcy Court for the Southern District of New York appointed attorney Isaac Nutovic as bankruptcy trustee, who contended that Mr. Piano had committed a fraud in having the Company repay his loans. After a lengthy adversary proceeding, the New York bankruptcy court found that there was no fraud. (R. at 549). (*In Re: Mizlou Communications Company, Inc., Debtor, Isaac Nutovic, Trustee of the Estate of Mizlou Communications Company, Inc. v. Vincent Piano*, U.S. Bankruptcy Court, S.D.N.Y., Adversary File No. 93-9205A, filed June 28, 1993). On February 24, 1994, the Hon. James F. Garrity, Jr., Bankruptcy Judge, U.S. Bankruptcy Court, Southern District of New York, found that Mr. Piano was a credible witness and that the Trustee failed to prove fraud under 11 U.S.C. § 548, and that the repayment was merely a technical preference under 11 U.S.C. § 547(b).[1] The New York bankruptcy court stated "[W]e, again, want to make very clear that we don't believe that Mr. Piano acted with an intent to defraud or cheat or take advantage of anyone." (R. at 549, l. 4.)

After the New York bankruptcy court rendered its verdict, Mr. Nutovic continued to pursue Mr. Piano in Georgia for the preference judgment, and Mr. Piano was forced to file bankruptcy in an attempt to halt the spiraling legal expenses to defend himself against Mr. Nutovic. The only creditor in the case is Mr. Nutovic. (R. at 625, l. 22.)

B. The Proceedings Below

On May 16, 1995 Respondent Albert F. Nasuti, the Chapter 7 Trustee filed a complaint against Petitioners Vincent C. Piano, and his spouse, Louise Piano, in the United States Bankruptcy Court for the Northern District of Georgia. The complaint as amended alleged, inter alia, that certain transfers of real and

1. *See* page 13 of Plaintiff's Trial Exhibit 17 identified R. at 547 admitted R. at 547.

personal property made by Mr. Piano to his wife were fraudulent under the United States Bankruptcy Code and New York Debtor and Creditor Law.

Following a trial, the bankruptcy court, pursuant to its findings of fact entered on the record on April 29, 1996, rendered judgment on May 1, 1996 in favor of Respondent on count III of the complaint. Specifically, the bankruptcy court found that the transfer in question was made with the actual intent to hinder, delay or defraud future creditors pursuant to 276 of New York Debtor and Creditor Law. In its findings of fact, the bankruptcy court stated that its ruling on this claim was based on a finding of actual fraud by a "preponderance of the evidence."[2]

On May 7, 1996, Petitioners filed a Notice of Appeal to the United States District Court for the Northern District of Georgia.[3]

On October 15, 1996, the district court remanded the proceedings to the bankruptcy court for the limited purpose of allowing the bankruptcy court to clarify and amend its findings of fact and judgment. The bankruptcy court held a hearing on remand on February 4, 1997 and by order dated February 7, 1997, the bankruptcy court amended and clarified its findings of fact announced in open court on April 29, 1996, and its judgment entered on May 1, 1996, to show that Respondent established by

2. The proper standard of proving actual fraud for 276 of New York Debtor and Creditor Law is "clear and convincing" evidence.

3. On May 15, 1996, Respondent filed a motion for order amending findings and amending judgment to reflect the proper standard of review, clear and convincing evidence. The bankruptcy court held a hearing on Respondent's motion on June 26, 1996. At the hearing, the bankruptcy court stated that the court's prior ruling, and hence the judgment, would not change under either standard. The bankruptcy court recommended that Respondent file a motion at the district court level for an immediate remand to allow the bankruptcy court to amend its judgment.

clear and convincing evidence that Petitioner Mr. Piano's transfer of his one-half interest of the real property in question located in Huntington, New York, to Petitioner Mrs. Piano, was a conveyance made with intent to defraud pursuant to 276 of New York Debtor and Creditor Law.[4]

On October 2, 1997, the Hon. William C. O'Kelley entered an order and judgment affirming the judgment of the bankruptcy court, and on October 14, 1997, Petitioners filed a notice of appeal to the United States Court of Appeals for the Eleventh Circuit which affirmed the judgment below on June 8, 1998.

REASONS FOR GRANTING THE WRIT

I.

THE PETITION SHOULD BE GRANTED BECAUSE IT IS ONE OF THE MOST PRIMARY PRINCIPLES OF PROPERTY LAW THAT AN OWNER THEREOF IS ENTIRELY AT LIBERTY TO DISPOSE OF ANY PART OR ALL OF HIS POSSESSIONS, EITHER GRATUITOUSLY OR OTHERWISE, AT A TIME WHEN HE IS NOT OBLIGATED TO ANOTHER AND ANY SUCH TRANSFER IS NOT SUBJECT TO QUESTION FROM ANY SOURCE.

The Fifth Amendment to the United States Constitution provides in relevant part: "No person shall . . . be deprived of life, liberty, or property, without due process of law. . . ."

It is one of the most primary principles of property law that an owner thereof is entirely at liberty to dispose of any part or all of his possessions, either gratuitously or otherwise, at a time when

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4. The foregoing follows the recitation of proceedings entered by the Hon. William C. O'Kelley on October 2, 1997 (*See* Appendix B).

he is not obligated to another and any such transfer is not subject to question from any source. *In re Vitelli's Estate*, 261 N.Y.S. 266, 268 (Sur. Ct. 1932).

The bankruptcy court committed error in denying the Petitioner his Constitutionally guaranteed right to dispose of his property at a time when he had no debts and no known future creditors.

II.

THE PETITION SHOULD BE GRANTED BECAUSE UNDER NEW YORK LAW, SUBSEQUENT INDEBTEDNESS CANNOT BE INVOKED TO MAKE THAT FRAUDULENT WHICH WAS HONEST AND FREE FROM IMPEACHMENT AT THE TIME.

The bankruptcy court determined[5] that there was a fraudulent conveyance pursuant to § 276, New York Debtor and Creditor Law which states as follows:

> Every Conveyance made and every obligation incurred with actual intent, as distinguished from the intent presumed in law, to hinder, delay, or defraud either present or future creditors, is fraudulent as to both present and future creditors.

§ 276 New York Debtor and Creditor Law, McKinley's.

The bankruptcy court construed New York law as allowing any or all of three separate and distinct basis of intentionally interfering with the rights of a future creditor: (1) to defraud; (2) to hinder; or (3) to delay. The bankruptcy court took great pains to

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5. *See* May 1, 1996 Judgment set forth at Appendix C.

find that Mr. Piano committed no fraud, but found that Mr. Piano intended to delay and hinder his future creditors by transferring his one half interest in the property. (R. at 636, l. 7). The key fact which is to be proved by the evidence is:

> Whether Mr. Piano actually intended to defraud, hinder or delay payment of $125,384.23 to the bankruptcy estate of Mizlou Communications, Inc., on November 27, 1990 when he transferred his one half interest in the family home to his wife.

Under section 276, New York Debtor and Creditor Law, McKinley's, for actually fraudulent conveyance, actual intent to defraud must be proven by clear and convincing evidence. (*Marine Midland Bank v. Murkoff*, 120 A.D. 2d 122, 508 N.Y.S. 2d 17, 20 (A.D. 2 Dept. 1986)). The bankruptcy court in announcing its judgment used the standard of preponderance of the evidence which falls far short of the standard necessary to prove actual fraud.

Under New York law, a "creditor" is a person to whom a debt is owing by another person. *In re Vitelli's Estate*, 261 N.Y.S. 266, 268 (Sur. Ct. 1932). In order to establish that a conveyance was in fraud of creditors, there must be definite proof that creditors existed who were able to be defrauded. *Wantulok v. Wantulok*, 67 Wyo. 22, 214 P.2d 477, 484 (Wyo., 1950).[6]

Where at time of a gift to wife, husband has no creditors, a transfer is not fraudulent as to future creditors unless it is shown that husband intended to put property beyond their reach. *In re Chadwick's Estate*, 154 Pa. Super. 157, 35 A.2d 582, 583 (Pa., 1944).[7] The presumption of fraud from a voluntary conveyance

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6. Wyoming has adopted the Uniform Fraudulent Conveyance Act.

7. Pennsylvania has adopted the Uniform Fraudulent Conveyance Act.

applies only in favor of an existing creditor. *Vail v. Diamond*, 100 N.J. Eq. 393, 135 A. 791, 592 (N.J., 1927).[8] "Future creditor" does not exist, so as to support presumption of fraudulent conveyance based upon fraudulent intent of conveying debtor and existence of present or future creditor at time of conveyance, unless conveying party can reasonably foresee incurring costs of claim or judgment at time of the conveyance. *Leopold v. Tuttle*, 378 Pa. Super. 466, 549 A.2d 151, 154 (1988). Under statute governing conveyances made with intent to hinder, delay, or defraud present or future creditors, as to future creditors the debt must be incurred within a reasonable time after the transfer. *Hicks v. Sovran Bank/ Chattanooga*, 812 S.W. 2d 296, 301 (Tenn. App. 1991).[9]

Therefore according to the cases which have interpreted the status of future creditors in a fraudulent conveyance action, the future debt in this case would not be applicable.

III.

THE PETITION SHOULD BE GRANTED BECAUSE IN ORDER TO ESTABLISH THAT CONVEYANCE WAS IN FRAUD OF CREDITORS, THERE MUST BE DEFINITE PROOF THAT CREDITORS EXISTED WHO WERE ABLE TO BE DEFRAUDED.

There must be actual intent to hinder, delay or defraud creditors. *GAFCO, Inc. v. H.D.S. Mercantile Corp.*, 47 Misc. 2d 661, 263 N.Y.S. 2d 109, 115 (1965). There must be intentional fraud, not alone the hindering and delaying of other creditors from collection of their respective debts, in order to set aside an alleged fraudulent conveyance. *Doehler v. Real Estate Board of N.Y. Bldg.*

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8. New Jersey has adopted the Uniform Fraudulent Conveyance Act.

9. Tennessee has adopted the Uniform Fraudulent Conveyance Act.

Co., 150 Misc. 733, 270 N.Y.S. 386, 395-400 (Sup. 1934).[10] Under New York law, a "creditor" is a person to whom a debt is owing by another person. *In re Vitelli's Estate*, 261 N.Y.S. 266, 268 (Sur. Ct. 1932). Thus the New York trustee was not a creditor at the time of the transfer.

Under New York law, a creditor must prove that a transfer was made with actual intent to defraud. *In re Sol Goodman Co.*, 5 F. Supp. 517, 519 (U.S.D.C., S.D.: N.Y. 1932). If there is not evidence sufficient to show actual intent, conveyance may not be set aside. *Feist v. Druckerman*, 70 F.2d 333, 334 (2d Cir. 1934); *Smith v. Eldridge*, 143 N.Y.S. 87, 89-90 (1913). Actual intent is a necessary element to the cause of action for fraudulent conveyance. *United States v. Paladin*, 539 F. Supp. 100, 104 (U.S.D.C., W.D.: N.Y. 1982); *Trustees of Hamilton College v. Cunningham*, 70 A.D. 2d 1048, 418 N.Y.S. 2d 251, 254 (A.D. 4 Dept. 1979).

The requirement of "actual intent to defraud" consists of deception intentionally practiced to frustrate the legal rights of another. *Southern Industries, Inc. v. Jeremias*, 66 A.D. 2d 178, 411 N.Y.S. 2d 945, 948 (1978). [*See* Tab No. 11]. A conveyance in fraud of creditors must be based on actual intent which may not rest on mere suspicion. *Lupia v. Lupia*, 199 N.Y.S. 2d 733, 735 (1960). [*See* Tab No. 12]. (*See also Service Finance Corp. v. Werber*, 169 A.D. 2d 555, 564 N.Y.S. 2d 408 (A.D. 1 Dept. 1991). (Where a creditor did not consider property which was transferred to be part of debtor's net worth to which creditor might look in event of default, evidence was insufficient to prove actual intent to hinder, delay or defraud either present or future creditors.)

Since the identity of the future creditors was unknown, Petitioner could not possess the requisite intent.

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10. In *Farino v. Farino*, 113 Misc. 2d 374, 449 N.Y.S. 2d 379, 386 (Sup. 1982), the court held that if there is no intent to defraud, there must be actual intent to hinder or delay creditors.

IV.

THE PETITION SHOULD BE GRANTED BECAUSE UNDER NEW YORK LAW, THE STANDARD FOR FINDING INTENTIONAL FRAUD PURSUANT TO SECTION 276 IS CLEAR AND CONVINCING EVIDENCE.

Under New York law, for actually fraudulent conveyance, actual intent to defraud must be proven by clear and convincing evidence. The burden does not shift in actual intent cases. *United States v. McCombs*, 30 F.3d 310, 328 (2d Cir. 1994). (*See also Marine Midland Bank v. Murkoff*, 120 A.D. 2d 122, 508 N.Y.S. 2d 17, 20 (A.D. 2 Dept. 1986).

The bankruptcy court in announcing its judgment used the standard of preponderance of the evidence which falls far short of the standard necessary to prove actual fraud.

This is not a case of constructive intent, but of actual intent. The bankruptcy court stated "I don't want to use the word defraud today . . ." (R. at 636). The bankruptcy court went on to say "But it was — this conveyance was made with the actual intent to hinder and delay these future creditors." The bankruptcy court found that ". . . the equities in this case probably — absent the transfer of the home in New York, are all in your favor." (R. at 625).

The difficulty in this case stems from the bankruptcy court's struggle with the interpretation of New York law. The bankruptcy court stated that:

> I don't know and I'm not finding that you specifically anticipated that a judgment on a preference would be rendered in favor of the Mizlou bankruptcy trustee, and that's not my finding. But

> it is my finding that you anticipated a problem, you anticipated that a creditor might raise its ugly head based upon your past acts.[11] It was not what you anticipated. But I don't see any law that's been brought to my attention, and I read this statute, and it's this Court's finding in accordance with that law, that you don't have to specifically anticipate the creditor that rears its ugly head.

(R. at 634).

The bankruptcy court further stated ". . . I'm not saying you knew where it was coming from and I'm sure it was a great surprise to you that you have this obligation against you." (R. at 636). The bankruptcy court found "You didn't have any debts right then." (R. at 636). The bankruptcy court stated

> [t]he Trustee has convinced me by a preponderance of the evidence that there was some anticipation on your part that someone, some creditor, was going to come after you and get that house that you and your wife had saved for all of your life.

(R. at 633). "Could have been a stockholder derivative suit — I don't think that the right — stockholder suit of some kind, a debenture suit." "And it does bother the Court somewhat, not enough to rule in your favor though, that what you might have anticipated — I think you just generally anticipated a problem, a future creditor." (R. at 634).

The above amply demonstrates the bankruptcy court's doubts as it struggled with the evidence and the application of the New

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11. The "past acts" were not identified by the Court, but it is believed that they consisted of legitimate acts in the usual and ordinary course of business, and not a pattern of fraudulent acts.

York law. The bankruptcy court stated that it was bothered that the debt really wasn't incurred. (R. at 634). This doubt is understandable for the finding of an intent to defraud an unknown and unanticipated future creditor is a concept which is not a part of the bankruptcy law nor even the law of Georgia. In fact, the concept as applied by the bankruptcy court does not even exist in New York.

Black's Law Dictionary, 6th Ed., defines "clear and convincing proof" as:

> That proof which results in reasonable certainty of the truth of the ultimate fact in controversy. Proof which requires more than a preponderance of the evidence but less than proof beyond a reasonable doubt. Clear and convincing proof will be shown where the truth of the facts asserted is highly probable.

Black's Law Dictionary, 6th Edition, West Publishing Co.

The standard of "clear and convincing" is difficult to measure, for it lies in the vast gray area between a mere tipping of the scales, and near total certainty. The Uniform Rules of Evidence which were promulgated in August, 1953 distinguished three evidentiary burdens as "preponderance of the evidence," "clear and convincing evidence," and "beyond a reasonable doubt."

> "Clear and convincing" evidence should produce in the mind of the trier of fact a firm belief or conviction as to the truth of the allegations sought to be established. Child v. Child, 8 Utah 2d 261, 268, 332 P.2d 981, 986 (Sup. Ct. 1958). It is questionable whether the standard can be adequately verbalized in greater detail. An effort to do so may

be found in Tapler v. Frey, 184 Pa. Super. 239, 182 A.2d 890, 893 (Super. Ct. 1957), wherein it is said that for evidence to be "clear, precise and indubitable," "clear or convincing," or "clear and satisfactory,"

> . . . the witnesses must be found to be credible, . . . the facts to which they have testified distinctly remembered and the details thereof narrated exactly and in due order, and . . . their testimony . . . so clear, direct and weighty and convincing as to enable either a judge or jury to come to a clear conviction, without hesitancy, of the precise facts in issue.

Aiello v. Knoll Golf Club, 64 N.J. Super. 156, 165 A.2d 531 (Super. Ct. 1960).

The extensive 1974 revision of the Uniform Rules of Evidence is silent as to a definition of "clear and convincing evidence".[12] Further, the undersigned was unable to locate a statutory definition of "clear and convincing evidence" under New York law. However, in the *Matter of Storar*, 52 N.Y. 2d 363, 420 N.E. 2d 64 (Ct. Appeals, 1981), the New York Court of Appeals provided a clarification of "clear and convincing" which it termed the "highest standard applicable to civil cases":

> This standard serves to "impress the factfinder with the importance of the decision" (*Addington v. Texas*, 441 U.S. 418, 427, 99 S. Ct. 1804, 1810, 60 L. Ed. 2d 323) and it " 'forbids relief whenever the evidence is loose, equivocal or contradictory' "

12. It should be noted that neither New York nor Georgia has adopted the Uniform Rules of Evidence.

(*Backer Mgt. Corp. v. Acme Quilting Co.*, 46 N.Y. 2d 211, 220, 413 N.Y.S. 2d 135 385 N.E. 2d 1062).

Matter of Storar, 52 N.Y. 2d 363, 420 N.E. 2d 64 (Ct. Appeals, 1981).

The bankruptcy court initially made its finding of facts by a preponderance of the evidence. (R. at 633, l. 18.) The bankruptcy court found that Mr. Piano did not anticipate the particular creditor which ultimately caused this bankruptcy. (R. at 633, 634 and 635.) The bankruptcy court found that Mr. Piano did not have any debts at the time of the transfer. (R. at 634, l. 22.) The bankruptcy court stated that it based its judgment primarily on one document which was a handwritten draft[13] which was never circulated. (R. at 626.) Petitioners contend that the bankruptcy court committed error by failing to adhere to New York law as it has been construed by the New York courts.

Therefore, while the bankruptcy court has amended its basis for the decision awarding the trustee over three times the amount of his only claim, the announcement is contrary to the findings already made a part of the record in this case. The bankruptcy court's finding of facts and conclusions of law were not clear and convincing, and the facts standing alone were far from clear and convincing to support the case of the trustee. The result now before this Court was reached through hindsight. Under New York law such a result is forbidden.

CONCLUSION

If the status of the law in 1990 was such that fraud may be assumed as to future creditors, then where are the cases discussing such a bizarre conclusion? The issue in this case is incredibly simple:

> **If a person were unable to transfer all of his assets to another person or entity without consideration at a time when he had no debts and no known liabilities then every irrevocable trust would be rendered invalid.**

The only debt which was ever avoided in this case was one which was totally unknown to and unanticipated by the debtor until three years after the fact and over two and one half years after the last transfer of assets. The debtor was never insolvent, nor did any debts go unpaid. The fact is that the only creditor of the estate is the New York Trustee and no other creditor suffered as a result of the transfer. For the reasons set forth above Petitioners respectfully request that this Court grant this petition for a writ of certiorari to review the judgments as being in violation of New York law.

This the 3th day of September, 1998.

Respectfully submitted,

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APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT FILED JUNE 8, 1998

[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 97-9164
Non-Argument Calendar

D. C. Docket No. 2:96-CV-86-NCO

IN RE: VINCENT C. PIANO,

Debtor.

VINCENT C. PIANO, a.k.a. Vic Piano, LOUISE PIANO,

Defendants-Appellants,

versus

ALBERT F. NASUTI, Trustee,

Plaintiff-Appellee.

Appeal from the United States District Court for the Northern District of Georgia

(June 8, 1998)

Appendix A

Before BIRCH, DUBINA and MARCUS, Circuit Judges.

PER CURIAM:

After conducting a trial in this matter, a bankruptcy judge entered a judgment in favor of the appellee, Albert F. Nasuti, Trustee ("the Trustee"), against the appellant Louise Piano, in the amount of $402,500, based upon the Trustee's complaint to set aside fraudulent transfers. Specifically, the bankruptcy court found that Vincent Piano transferred his one-half undivided interest in his home in Huntington, New York, to his wife, Louise Piano, on November 27, 1990, and that said transfer was a fraudulent transfer under New York debtor/creditor law. The bankruptcy court also found that Louise Piano sold the house and received net proceeds of approximately $805,000. Subsequently, $600,000 of those proceeds were deposited in an account in Louise Piano's name with Citicorp Investment Services, a subsidiary of Citibank, N.A.

Appellants appealed the bankruptcy court's judgment to the district court. In its first order, the district court remanded the case to the bankruptcy court for the limited purpose of permitting the bankruptcy court to clarify and amend its findings of fact and judgment. The bankruptcy court held a hearing on remand and by subsequent order amended and clarified its findings of fact to show that the Trustee established by clear and convincing evidence that Vincent Piano's transfer of his one-half interest of the real property in question located in Huntington, New York to Louise Piano was a conveyance made with intent to defraud under New York law. *See* N.Y. Debtor and Creditor Law § 276 (McKinney 1990). In an order entered on October 2, 1997, the district court affirmed the bankruptcy court's judgment.

After reading the parties' briefs and reviewing the extensive record in this case, we conclude that the district court did not err in affirming the bankruptcy court's judgment. It is clear from the record that Vincent Piano, who faced imminent and severe financial problems, attempted to defeat the claims of known and anticipated creditors by transferring his property to his spouse with fraudulent intent. Because we reject all of the appellants' arguments on appeal, we affirm the district court's order affirming the judgment of the bankruptcy court.

AFFIRMED.

APPENDIX B — JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DIVISION OF GEORGIA, GAINESVILLE DIVISION FILED OCTOBER 3, 1997

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
GAINESVILLE DIVISION

BANKRUPTCY ACTION
NO. 94-20539-REB
ADVERSARY: 96-2044-REB

CIVIL ACTION NO.
2:96-cv-86-WCO

VINCENT C. PIANO a/k/a VIC PIANO and LOUISE PIANO,

Appellants,

v.

ALBERT F. NASUTI

Appellee.

JUDGMENT

This action having come before the court, Honorable William C. O'Kelley, Senior United States District Judge, **AFFIRMING** the bankruptcy court's decision of February 7, 1997.

Dated at Gainesville, Georgia, this 3rd day of October, 1997.

Appendix B

LUTHER D. THOMAS, CLERK
By: s/ Johnnie Sanders
Deputy Clerk

Filed & entered in Clerk's
Office this 3rd day of
October, 1997.

LUTHER D. THOMAS, CLERK

By: s/ J. Sanders
Deputy Clerk

APPENDIX C — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF GEORGIA, GAINESVILLE DIVISION, FILED OCTOBER 3, 1997

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
GAINESVILLE DIVISION

CIVIL NO. 2:96-CV-086-WCO

VINCENT C. PIANO a/k/a VIC PIANO and LOUISE PIANO,

Appellants,

ALBERT F. NASUTI,

Appellee.

ORDER

The captioned case is before the court for consideration of appellants' appeal [1-1] and appellants' request for oral argument [17-1]. The court heard oral argument in this case on September 27, 1996, at 1:30 p.m. at the United States Courthouse, Gainesville, Georgia. After reviewing the file, the court is of the opinion that further oral argument is unnecessary. Accordingly, appellants' request for oral argument is hereby DENIED [17-1].

Appellee Albert F. Nasuti is the Chapter 7 Trustee in the captioned case. On May 16, 1995, appellee filed a complaint against appellants Vincent C. Piano, and his spouse, Louise Piano, in the United States Bankruptcy Court. The complaint alleged, inter alia, that certain transfers of real and personal

property made by Mr. Piano to his wife were fraudulent under the United States Bankruptcy Code and New York Debtor and Creditor Law. On January 29, 1996, the bankruptcy court entered partial summary judgment in favor of appellee on counts I and II of the complaint.

On May 1, 1996, the bankruptcy court, pursuant to its findings of fact entered at a hearing held on April 29, 1996, entered judgment in favor of appellee on count III of the complaint. Specifically, the bankruptcy court found that the transfer in question was made with the actual intent to hinder, delay or defraud future creditors pursuant to § 276 of New York Debtor and Creditor Law. In its findings of fact, the bankruptcy court stated that its ruling on this claim was based on a finding of actual fraud by a "preponderance of the evidence." The proper standard of proving actual fraud for § 276 of New York Debtor and Creditor Law is "clear and convincing" evidence.

On May 7, 1996, appellants filed a Notice of Appeal to this court. On May 15, 1996, appellee filed a motion for order amending findings and amending judgment to reflect the proper standard of review, clear and convincing evidence. The bankruptcy court held a hearing on appellee's motion on June 26, 1996. At the hearing, the bankruptcy court stated that the court's prior ruling, and hence the judgment, would not change under either standard. The bankruptcy court recommended that appellee file a motion at the district court level for an immediate remand to allow the bankruptcy court to amend its judgment.

By order dated October 15, 1996, this court remanded the instant proceedings to the bankruptcy court for the limited purpose of allowing the bankruptcy court to clarify and amend its findings of fact and judgment. The bankruptcy court held a

hearing on remand on February 4, 1997. By order dated February 7, 1997, the bankruptcy court amended and clarified its findings of fact announced in open court on April 29, 1996, and its judgment entered on May 1, 1996, to show that appellee established by clear and convincing evidence that appellant Mr. Piano's transfer of his one-half interest of the real property in question located in Huntington, New York, to appellant Mrs. Piano, was a conveyance made with intent to defraud pursuant to § 276 of New York Debtor and Creditor Law. Accordingly, the instant appeal is now ripe for the court's review.

Facts

Mr. Piano started Mizlou Television Network in 1969, which eventually merged into Mizlou Communications Company, ("Mizlou"). Mr. Piano was a principal shareholder, the Chief Executive Officer, Chairman of the Board of Directors, and Secretary of Mizlou. [R. at 77, 111] Mr. Piano was paid a salary of approximately $150,000 per year. [R. at 82] Mrs. Piano was employed by Mizlou as a bookkeeper. (R. at 83) Appellants' son and son-in-law were high-ranking executives at Mizlou. [R. at 84-86] Appellants owned approximately 500,000 shares of Mizlou stock each. [R. at 426, 435]

During the late 1980s, Mizlou started a televised sports news service. The undertaking required $20-25 million and thus Mizlou made a series of public offerings. [R. at 128] The first two stock offerings failed to raise enough capital to cover the operating expenses. As a result, Mizlou sold a private bond offering. As security for this short-term "bridge loan," due and payable on November 30, 1990, appellants, appellants' son, and appellants' son-in-law signed non-recourse personal

guaranties and pledged their Mizlou stock. [R. at 133-40] This loan again proved insufficient and Mizlou obtained a second bridge loan, also due and payable on November 30, 1990, and guaranteed by appellants' stock. [R. at 133-44, 434-35]

Beginning in late 1989 and through 1990, Mizlou had significant cash flow problems which raised substantial doubt its ability to continue as a going concern. [R. at 125-26] In October of 1990, officers of Mizlou contacted Chester Salomon, a bankruptcy attorney, to discuss the possibility of filing a bankruptcy petition. On December 26, 1990, Mizlou filed a Chapter 11 petition in the Southern District of New York. The case was converted to a Chapter 7, and a Chapter 7 trustee was appointed.

Mizlou was in financial trouble in late 1990. Mizlou stock was basically worthless after June of 1990, trading as low as $3^1/_8$ cents per share in November and December of 1990. [R. at 428] The bridge loans, guaranteed by appellants' Mizlou stock, were due on November 30, 1990. Mr. Piano had been deferring his salary and receiving worthless Mizlou stock. [R. at 163-68]

On November 27, 1990, Mr. Piano transferred his one-half interest in the Piano family residence in New York (the "New York property") to Mrs. Piano for no consideration. [R. at 197] Three days later the bridge loans became due, and two weeks later Mizlou decided to proceed with the bankruptcy filing. On August 31, 1992, Mrs. Piano sold the New York property for approximately $805,000. [R. at 356] The proceeds were placed in several accounts in various financial institutions. [R. at 357]

On June 28, 1993, the Mizlou Trustee filed a preference action against Mr. Piano to recover a preferential transfer made

to Mr. Piano within one year prior to the filing of the Mizlou bankruptcy petition. [R. at 333] On July 14, 1993, appellants closed several accounts which had been opened in both appellants' names. Mrs. Piano then opened new accounts in her name only. By order dated February 24, 1994, the Bankruptcy Court for the Southern District of New York entered judgment against Mr. Piano for approximately $125,000 plus interest. [R. at 336]

Appellants also owned a piece of property in White County, Georgia (the "Georgia property"). [R. at 86] Appellants, using the proceeds of the sale of the New York property, constructed a home on the Georgia property from 1993-94 and currently reside in the home. [R. at 379] By warranty deed dated January 16, 1990, Mr. Piano transferred his interest in the Georgia property to Mrs. Piano, again for no consideration. Order, January 29, 1996. This deed was not recorded until August 1, 1994, almost five years after the alleged date of the transfer and just over three months after Mr. Piano filed a Chapter 7 bankruptcy petition on April 25, 1994. Order, January 29, 1996.

Consequently, at the time of his bankruptcy, Mr. Piano, the creator and chief executive of a major television production company, who boasted of his relationship with national sports executives and referred to himself as "a major executive for 35 years in New York City," claimed as his only assets in the world $200 cash, $400 in various household goods and collectibles, and $500 in clothing. Chapter 7 Bankruptcy Petition of Vincent C. Piano, Schedule B. Mrs. Piano, however, who made $26,000 as a bookkeeper for Mizlou, had full ownership of the New York property, four expensive automobiles, and, ultimately, bank accounts worth approximately $600,000 and an unencumbered home in Georgia. [R. at 83-84, 87-88, 183]

Appendix C

On May 16, 1995, appellee, as the Chapter 7 Trustee, filed suit against appellants alleging that the transfer of Mr. Piano's interests in the New York property, the Georgia property, and the joint bank accounts, to Mrs. Piano, were fraudulent pursuant to New York Debtor and Creditor Law and the Bankruptcy Code. With respect to counts I and II, which dealt with the post-petition transfer of the Georgia property, the bankruptcy court granted summary judgment to appellee and held that the transfer was void pursuant to 11 U.S.C. § 544(a)(3). This judgment was not appealed and is not at issue herein.

On March 14-15 and April 29, 1996, trial was held on count III in which appellee alleged that the transfer of the New York property was fraudulent pursuant to §§ 273, 275, and 276 of New York Debtor and Creditor Law. On April 29, 1996, the bankruptcy court held that it found by a preponderance of the evidence that Mr. Piano's transfer of his one-half interest in the New York property to his wife was a conveyance made with the actual intent to hinder, delay, or defraud future creditors pursuant to § 276 of New York Debtor and Creditor Law. Judgment was entered on May 1, 1996, and appellants filed a Notice of Appeal on May 7.

As stated above, the bankruptcy court ultimately amended and clarified its April 29, 1996 order to reflect that its ruling was based upon clear and convincing evidence. By order dated February 7, 1997, the bankruptcy court specifically held that appellee had established by clear and convincing evidence that Mr. Piano's transfer of his interest in the New York property to his wife was a conveyance made with intent to defraud pursuant to § 276 of New York Debtor and Creditor Law.

Appellants' initial brief on appeal set forth 18 issues. Following the bankruptcy court's amended and clarified order,

appellants filed a supplemental brief addressing Issue No. 5 as set forth in its original brief.

Legal Analysis

1. Appellants contend that the bankruptcy court committed error in applying the law of other jurisdictions in construing New York's Fraudulent Conveyance statute, § 276, and the cases relied upon did not support the conclusions reached by the court.

Appellants fail to cite to any evidence whatsoever in support of their assertion that the bankruptcy court applied law from other jurisdictions in construing New York law. Appellants cite to a statement made by the bankruptcy court regarding "badges of fraud" and argue that the bankruptcy court relied upon badges of fraud cases from other jurisdictions submitted by appellee. However, appellants have come forward with no evidence to show that the bankruptcy court relied upon the cases,

The term "badges of fraud" is a commonly used legal term defined in Black's Law Dictionary. Moreover, New York courts and federal courts applying New York law have utilized the term. *See e.g., United States v. McCombs,* 30 F.3d 310, 328 (2d Cir. 1994); *Liggio v. Liggio,* 385 N.Y.S.2d 33, 40 (N.Y. App. 1976); *In re Grand Jury Subpoena Duces Tecum Dated 15, 1983,* 731 F.2d 1032 (2d Cir. 1984)(applying § 276)(citing *Gafco, Inc. V. H.D.S. Mercantile Corp.,* 2d 109, 114 (N.Y. Civ. Ct. 1965); *In re Kaiser,* 722 F.2d 1582 (2d Cir. 1983). Lastly, the court notes that even the bankruptcy court relied upon the cases to some degree, such reliance would not constitute error.

Appendix C

Section 276 provides:

> Every conveyance made and every obligation incurred with actual intent, as distinguished from intent presumed in law, to hinder, delay, or defraud either present or future creditors, is fraudulent as to both present or future creditors.

N.Y. Debt. & Cred. § 276. The burden to show actual fraud was acknowledged by appellee, and the bankruptcy court understood the burden. [R. at 555, 578-79]. The cases cited by appellee set forth the same factors used by New York courts to establish fraudulent conduct. The court applied a combination of various factors and specifically held in its order dated February 7, 1997, that appellee established by clear and convincing evidence that Mr. Piano's transfer to his wife "was a conveyance made with intent to defraud pursuant to N.Y. Debt. & Law 276 (McKinney)." Order, February 7, 1997. Accordingly, the court finds that the bankruptcy court did not commit error with respect to Issue No. 1.

2. Appellants contend that the bankruptcy court committed error in creating new common law remedies which do not exist under New York law regarding intent to hinder, delay and defraud future creditors.

Appellants argue that under New York law, the relief to which a creditor is entitled in an action to set aside a fraudulent conveyance is limited to that which could have been obtained had there been no conveyance. Appellants then cite to *Marine Midland Bank v. Murkoff,* 508 N.Y.S.2d 17 (N.Y. App. Div. 1986), in support of the proposition that under New York law "a creditor is generally not entitled to money damages because

he is not entitled to an enhancement of position beyond what it was before the fraud." Appellants' Brief, 9. The *Marine Midland Bank* case actually provides that "[a] money judgment against the grantee is sometimes an available form of relief [citations omitted], but because the defrauded creditor is not entitled to an enhancement of position beyond what it was before the fraud, such a judgment may be granted only where the grantee has disposed of the wrongfully conveyed property or depreciated it." *Marine Midland Bank,* 508 N.Y.S.2d at 24-25 The case supports the imposition of a money judgment under facts of this case because the grantee, Mrs. Piano, disposed of the wrongfully conveyed property.

Appellants also argue that the bankruptcy court "created a remedy allowing the Trustee to impose a constructive trust upon proceeds from the sale of the New York property, ..." Appellants' Brief, 10. Appellants further argue that the bankruptcy court awarded money damages far in excess of the only claim filed in the bankruptcy and, as such, the award is clearly punitive. *Id.*, Appellants then cite several cases in support of their arguments.

The bankruptcy court's order dated May 1, 1996, provides that the transfer of Mr. Piano's one half interest in the New York property to Mrs. Piano is voided. The order directs that "Plaintiff recover from and have judgment against Defendant Piano in the sum of $402,500.00." Order, May 1, 1997. The order does not provide for punitive damages or a constructive trust. The sum of $402,500.00 is one-half of the proceeds of the sale of the New York property and represents Mr. Piano's interest in the property. Accordingly, appellants' assertions regarding punitive damages and constructive trusts are without merit.

Appellee concedes that the judgment is in excess of the amount of the claim filed against Mr. Piano's estate. However, appellee asserts that a Chapter 7 Trustee is appointed to administer the assets and debts of the debtor's estate. 11 U.S.C. § 704. Therefore, until the Trustee analyses all of the claims against the estate, files a final report and closes the estate, it is not possible to determine the total amount of liabilities against the estate, as such liabilities include not only the claims of creditors but also administrative costs, including fees for the Trustee and his professionals. Moreover, property brought into the estate which is not used to pay creditors or administrative costs is returned to the debtor upon the closing of the case.

Accordingly, the court finds that the bankruptcy court did not commit error with respect to Issue No. 2.

4. Appellants contend that under New York law, the burden of proof under § 276 does not shift to the debtor, but remains with the creditor in finding intentional fraud and the bankruptcy court committed error in shifting the burden to the debtor.

Appellee concedes that appellee has the burden of proof to how actual fraud by clear and convincing evidence. Appellants argue that the bankruptcy court committed error by shifting burden to the debtor, Mr. Piano. However, the record makes clear that the bankruptcy court was aware that the burden to show actual fraud remained with appellee and did not shift. [R. 578-79] Moreover, the bankruptcy court's amended order early shows that the burden remained with appellee and appellee satisfied his burden. Order, February 7, 1997. Accordingly, the court finds that the bankruptcy court did not commit error with respect to Issue No. 4.

5. Appellants contend that under New York law, the standard for finding intentional fraud pursuant to § 276 is clear and convincing evidence, and the bankruptcy court committed error in failing to find clear and convincing evidence.

This issue was addressed by the bankruptcy court's amended order holding that appellee had established by clear and convincing evidence that Mr. Piano's transfer to Mrs. Piano of his interest in the New York property was a conveyance made with actual intent to defraud. Consequently, appellants filed a supplemental brief and argue that "the Court's finding of the evidence is not supported by its own announcement of the finding of the facts." Appellants' Supplemental Memorandum of Law, 2. The issue, as the court understands it, is now whether the bankruptcy court's findings of fact constitute clear and convincing evidence of actual intent to defraud under § 276.

The issue appears to be a mixed question of law and fact, However, the issue is primarily a factual inquiry because the determination of intent is itself a question of fact. *See In re Coggin,* 30 F.3d 1443, 1452 (11th Cir. 1994)(bankruptcy court's finding that the transfer was made to hinder, delay, or defraud creditor, within meaning of statutory exception to discharge, was finding of fact which the Court of Appeals could not disturb except for clear error). Accordingly, the court will review the bankruptcy court's determination that appellee established that the conveyance was made with actual intent to commit fraud under the clearly erroneous standard of review, *See* Fed. R. Bankr. P. 8013 (district court reviews findings of fact under the clearly erroneous standard).

The bankruptcy court's ultimate finding of actual intent to defraud by appellants rests upon underlying factual findings

regarding the circumstances surrounding the conveyance. "[F]raudulent intent, by its very nature, is rarely susceptible to direct proof and must be established by inference from the oircumstances surrounding the allegedly fraudulent act." *Marine Midland Bank,* 508 N.Y.S.2d at 21. The facts, as set forth by the bankruptcy court, clearly support the bankruptcy court's finding of appellants' actual intent to hinder, delay, defraud future creditors. Appellants have failed to rsuade the court that such findings are clearly erroneous. Accordingly, this court is bound by the bankruptcy court's findings of fact on the circumstances regarding the questioned conveyance. *In re Downtown Properties Ltd.,* 794 F.2d 647, 651 (11th Cir. 1986).

The court must now address whether the factual findings set forth by the bankruptcy court constitute clear and convincing evidence of actual intent to defraud, hinder, or delay future creditors. Clear and convincing evidence is defined by Black's Law Dictionary as "[t]hat proof which results in reasonable certainty of the truth of the ultimate in controversy." Black's Law Dictionary (6th ed. 1990). The Eleventh Circuit has described the standard as "more exacting than the 'preponderance of the evidence' standard but, does not require proof beyond a reasonable doubt. *In re Jove Engineering, Inc. v. I.R.S.*, 92 F.3d 1539 (11th Cir. 1996)(citing *Jordan v. Wilson,* 851 F.2d 1290, 1292 (11th Cir. 1988)). The court finds that the bankruptcy court's findings fact constitute clear and convincing evidence of actual intent to defraud future creditors. The bankruptcy court found that a number of factors combined to support its holding: the transfer was made between a husband and wife; the transfer was made for no consideration; nearly all of Mr. Piano's property transferred to his wife; Mr. Piano retained possession of the property; Mizlou was facing financial difficulties; and Mr. Piano had knowledge of the Mizlou

bankruptcy. This court finds that the bankruptcy court's findings of fact establish proof which results in reasonable certainty of the truth of the ultimate fact in controversy, the actual intent to hinder, delay, or defraud future creditors. Accordingly, the court finds that the bankruptcy court did not commit error with respect to Issue No. 5.

7. Appellants contend that under New York law, subsequent indebtedness cannot be invoked to make that fraudulent which was honest and free from impeachment at the time, and the bankruptcy court committed error in ignoring the complete lack of debt of the debtor at the time of the transfer.

The cases cited by appellants do not support their argument and in fact instead support the bankruptcy court's ruling. Appellants assert that a transfer to wife at a time when husband has no creditors is not fraudulent as to future creditors unless it is shown that the husband intended to put the property beyond the reach of the future creditors. *In re Chadwick's Estate,* 154 Pa. Super. 157, 159 (Pa. Super. Ct. 1944). The bankruptcy court expressly found that Mr. Piano anticipated future creditors and imminent liability. In addition, the bankruptcy court found that Mr. Piano actually intended to defraud these future creditors.

Appellants also assert that it is one of the most primary principles of property law that an owner thereof is entirely at liberty to dispose of any part or all of his possessions, either gratuitously or otherwise, at a time when he is not obligated to another, and any such transfer is not subject to question from any source. *In re Vitelli's Estate,* 261 N.Y.S. 268 (Sur. Ct. 1932). However, the bankruptcy court found that the transfer of Mr. Piano's one-half interest in the New York property was

subject to question and was in fact a conveyance made with actual intent to hinder, delay, or defraud future creditors. Accordingly, the court finds that the bankruptcy court did not commit error with respect to Issue No. 7.

12. Appellants contend that under New York law, the presumption of fraud flowing from certain acts has ceased to exist, and the bankruptcy court committed error in applying a presumption of fraud to find actual intent.

This issue is addressed in the discussion following Issue No. 5. The bankruptcy court did not apply a presumption of fraud. The bankruptcy court found that appellee established by clear and convincing evidence that Mr. Piano's transfer of his interest in the New York property to Mrs. Piano was a conveyance made with actual intent to defraud future creditors. Accordingly, the court finds that the bankruptcy court did not commit error with respect to Issue No. 12.

17. Appellants contend that if there is no intent to defraud, there must be actual intent to hinder or delay creditors.

The bankruptcy court found actual intent to hinder, delay, defraud. Accordingly, the court finds that the bankruptcy court did not commit error with respect to Issue No. 17.

The remaining issues, numbered 3, 6, 8, 9, 10, 11, 13, 14, 15, 16, and 18, are addressed in the court's opinion set forth above. Any further discussion by the court would be duplicative. Accordingly, the bankruptcy court's decision is hereby AFFIRMED.

Appendix C

Summary

The bankruptcy court is hereby AFFIRMED.

IT IS SO ORDERED this 2nd day of October, 1997.

s/ William C. O'Kelley
WILLIAM C. O'KELLEY
Senior United States District Judge

APPENDIX D — ORDER OF THE UNITED STATES BANKRUPTCY COURT, NORTHERN DISTRICT OF GEORGIA, GAINESVILLE DIVISION ON REMAND FROM DISTRICT COURT DATED FEBRUARY 10, 1997

IN THE UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF GEORGIA
GAINESVILLE DIVISION

CASE NO. G94-20539-REB

CHAPTER 7

ADVERSARY NO. 95-2044

IN RE:

VINCENT C. PIANO,

Debtor.

ALBERT F. NASUTI, Trustee,

Plaintiff,

v.

VINCENT C. PIANO a/k/a VIC PIANO and LOUISE PIANO,

Defendants.

Appendix D

ORDER ON REMAND FROM DISTRICT COURT

The Judgment of this Court entered on May 1, 1996 was appealed by the Defendants to the United States District Court for the Northern District of Georgia, Gainesville Division.

On October 10, 1996, the Honorable William O'Kelly, Senior United States District Judge, remanded these proceedings to this Court for the limited purpose of allowing the Bankruptcy Court to clarify and amend its Findings of Fact and Judgment as pertains to the standard of proof on *Count III* of the Plaintiffs Complaint concerning the transfer of Debtor, Vincent Piano's, one-half (½) interest in the real property in question located in Huntington, New York, to Defendant, Louise Piano, under N.Y. Debt. & Cred. Law § 276 (McKinney).

A hearing on remand was conducted by this Court on February 4, 1997. After reconsideration of the testimony and evidence presented at trial, this Court amends and clarifies its Findings of Fact announced in open court on April 29, 1996 and its Judgment entered on May 1, 1996 to show that the Plaintiff established by clear and convincing evidence that Debtor, Vincent C. Piano's, transfer of one-half (½) interest of the real property in question located in Huntington, New York to Defendant, Louise Piano, was a conveyance made with intent to defraud pursuant to N.Y. Debt. & Cred. Law § 276 (McKinney).

It is further ordered that a copy of this Order be transmitted to the Clerk of the United States District Court for the Northern District of Georgia, Gainesville Division.

Appendix D

SO ORDERED this 7th day of February, 1997.

s/ Robert E. Brizendine
Robert E. Brizendine, Judge
U.S. Bankruptcy Court,
Northern Division of Georgia,
Gainesville Division

Submitted by:

s/ R. Michael Thompson
MICHAEL THOMPSON
Ga. State Bar No. 709325
THOMPSON, O'BRIEN, KEMP & NASUTI, P.C.
4845 Jimmy Carter Boulevard
Norcross, Georgia 30093
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APPENDIX E — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF GEORGIA FILED OCTOBER 15, 1996

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
GAINESVILLE DIVISION

CIVIL NO. 2:96-CV-86-WCO

VINCENT C. PIANO a/k/a VIC PIANO and LOUIS PIANO,

Appellants,

v.

ALBERT F. NASUTI,

Appellee.

ORDER

The captioned case is before the court for consideration of appellants' motion to certify portions of the appeal to the New York Court of Appeals [2-1] and appellee's motion for order remanding this proceeding to the United States Bankruptcy Court [5-1].

Appellee Albert F. Nasuti is the Chapter 7 Trustee in the captioned case. On May 16, 1995, Mr. Nasuti filed a complaint against debtor Vincent C. Piano, and his spouse, Louise Piano, in the United States Bankruptcy Court. The complaint alleged, *inter alia*, that certain transfers of real and personal property made by Mr. Piano to his wife were fraudulent under the United States Bankruptcy Code and New York Debtor and Creditor Law. On January 30, 1996, the Bankruptcy Court entered partial

summary judgment in favor of Mr. Nasuti on counts I and II of the complaint.

On May 1, the Bankruptcy Court, pursuant to its findings of fact entered at a hearing held on April 29, 1996, found in favor of Mr. Nasuti on count III of the complaint. Specifically the court found that the transfer in question was made with the actual intent to hinder, delay or defraud present and future creditors pursuant to § 276 of the New York Debtor and Creditor Law. In its order, the Bankruptcy Court stated that its ruling on this claim was based on a finding of actual fraud by a "preponderance of the evidence." Mr. Nasuti concedes that the proper standard of proving actual fraud for § 276 of New York Debtor and Creditor Law is "clear and convincing" evidence.

On May 1, 1996, the Pianos filed a Notice of Appeal to the District Court of the April 29, 1996, order containing the court's findings of fact and judgment against the Pianos. On May 15, 1996, Mr. Nasuti filed a motion for an order amending the findings and amending the judgement requesting, *inter alia*, that the Bankruptcy Court amend its April 29, 1996, order pursuant to Rule 52 of the Federal Rules of Civil Procedure. Mr. Nasuti later amended his motion realizing that Rules 54(b) or 60(b) were more appropriate Federal Rules of Civil Procedure pursuant to which the Bankruptcy Court could amend its April 29, 1996, order.

A hearing on Mr. Nasuti's motion for an order amending the findings and amending the judgment was held on June 26, 1996. At the hearing, the Bankruptcy Court stated that his prior ruling, and hence the judgment, would not change under either standard. The Bankruptcy Court recommended that Mr. Nasuti file a motion at the District Court level for an immediate remand to allow the Bankruptcy Court to amend its judgment.

Appendix E

The Pianos, in their response in opposition to Mr. Nasuti's motion to remand, argue that the issue regarding the standard of proof applied by the Bankruptcy Court in its judgment dated May 1, 1996, is only one of eighteen (18) issues appealed by the Pianos in this case. In addition, the Pianos argue that the Bankruptcy Court's indication that it would amend its judgment is in itself an abuse of discretion. However, what the Pianos fail to address is the District Court's need for a complete and final order to rule upon the Pianos' appeal. The court finds that the interests of justice and efficiency will be best served by ordering an immediate remand of these proceedings to the Bankruptcy Court for the limited purpose of allowing the Bankruptcy Court to clarify and amend its findings of fact and judgment.

Accordingly, appellee's motion to remand is hereby GRANTED [5-1], and appellants' motion to certify portions of the appeal to the New York Court of Appeals is hereby DENIED as MOOT [2-1].

IT IS SO ORDERED this 15th day of October, 1996.

s/ William C. O'Kelley
WILLIAM C. O'KELLEY
Senior United States District Judge

APPENDIX F — JUDGMENT OF THE UNITED STATES BANKRUPTCY COURT OF GEORGIA, GAINESVILLE DIVISION DATED MAY 1, 1996

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF GEORGIA
GAINESVILLE DIVISION

CASE NO. G94-20539-REB

ADVERSARY PROCEEDING
NO. 95-2044

CHAPTER 7

JUDGE BRIZENDINE

IN RE:

VINCENT C. PIANO,

Debtor.

ALBERT. F. NASUTI, Trustee

Plaintiff,

v.

VINCENT C. PIANO a/k/a VIC PIANO and LOUISE PIANO,

Defendants.

Appendix F

JUDGMENT

The Complaint of Plaintiff Albert F. Nasuti, Trustee, against Defendants Vincent C. Piano a/k/a Vic Piano and Louise Piano came on for trial before this Court on March 14 and 15, 1996, and April 29, 1996. The Court heard closing arguments on April 29, 1996.

The Court has considered the evidence, both oral and documentary, presented by Plaintiff in support of his Complaint against Defendants, as well as argument of counsel for Plaintiff and Defendants. For the reasons stated on the record on April 29, 1996, pursuant to Rule 52, Federal Rules of Civil Procedure, made applicable herein by Rule 7052, Federal Rules of Bankruptcy Procedure, it is hereby

ORDERED AND ADJUDGED, with respect to Count III of the Complaint, that judgment is granted, "in favor of the Plaintiff and against Defendants, and it is hereby

FURTHER ORDERED AND ADJUDGED that, pursuant to N.Y. Debt. & Cred. Law § 276 (McKinney), as made applicable herein 11 U.S.C. § 544(b), the transfer of one-half interest in the real property in question located in Huntington, New York, by Vincent C. Piano, Debtor herein, to Defendant Louise Piano is avoided; and, based upon the value of the real property transferred, it is therefore,

ORDERED AND ADJUDGED that, pursuant to 11 U.S.C. § 550(a), Plaintiff recover from and have judgment against Defendant Louise Piano in the sum of $402,500.

This Court has previously entered an Order granting Plaintiff's Motion for Partial Summary Judgment with respect

to Counts I and II of Plaintiff's Complaint. The remaining counts of Plaintiff's Complaint, as amended, as well as the Counterclaim asserted by Defendant Louise Piano remain pending before this Court, subject to future determination, and this Court retains jurisdiction to make such determinations, if necessary. Further, this Court retains jurisdiction to determine attorney's fees and costs asserted by Plaintiff pursuant to N.Y. Debt. & Cred. Law § 276-a (McKinney).

The Clerk is directed to serve a copy of this Order upon counsel for Plaintiff and counsel for Defendants.

IT IS SO ORDERED.

At Atlanta, Georgia, this 1st day of May, 1996.

s/ Robert E. Brizendine
ROBERT E. BRIZENDINE
UNITED STATES BANKRUPTCY JUDGE

APPENDIX G — EXCERPTS OF APRIL 29, 1996 BANKRUPTCY COURT PROCEEDINGS

[Commencing at page 15]

THE COURT: My time to talk, Mr. Piano. The Trustee has convinced me by a preponderance of the evidence that there was some anticipation on your part that someone, some creditor, was going to come after you and get that house that you and your wife had saved for all of your life.

Could have been a stockholder derivative suit — I don't think that's the right — a stockholder suit of some kind, a debenture suit. But you knew that bankruptcy was going to be filed. You'll never convince me that you didn't. It happened twenty-nine days after this transfer.

And it does bother the Court somewhat, not enough to rule in your favor though, that what you might have anticipated — I think you just generally anticipated a problem, a future creditor.

[16] I don't know and I'm not finding that you specifically anticipated that a judgment on a preference would be rendered in favor of the Mizlou bankruptcy trustee, and that's not my finding.

But it is my finding that you anticipated a problem, you anticipated that a creditor might raise its ugly head based upon your past acts. It was not what you anticipated. But I don't see any law that's been brought to my attention, and I read this statute, and it's this Court's finding in accordance with that law, that you don't have to specifically anticipate the creditor that rears its ugly head.

Appendix G

And I worried long and hard for the last month about that one issue. It bothers me that this is a debt that really wasn't incurred. It's a statutory debt. I mean, it's crazy that — I mean, between the lawsuit in New York and the Court's ruling today, I guess I could go ahead and say it just there's personally — this is a personal comment, it appears to be very unjust.

MR. PIANO: Appears to be what?

THE COURT: Very unjust. But that's a personal comment. That's not my ruling as the Court that —

MR. PIANO: But I didn't hear that personal [17] comment.

THE COURT: The personal comment is that if you go back and look at how this judgment was obtained and the negative ruling that you and your wife are receiving in this court today, personally it does appear to be unjust. But I'm not sitting here to weigh this matter personally. I'm sitting here trying to interpret the facts as I understand them today and interpret the law as I understand them today.

And as I understand the law in New York, and it does go, as far as this Court's concerned, a little bit further than the New York law, this transfer section, 275 or maybe 276 — and I'd like to read it into the record.

276, is that the way you cite the New York — there's no prefatory numbers? Section 276 of what? The fraudulent conveyance section? Whatever.

Every conveyance made and every obligation incurred with the actual intent, actual intent to hinder, delay or defraud, either

present or future creditors is fraudulent as to both present and future creditors.

I don't want to use the word defraud today but I know, and I'm ruling by a preponderance of the [18] evidence, that it was your intent in the anticipation of future creditors, future debt — I'm not saying you knew where it was coming from and I'm sure it was a great surprise to you that you have this obligation against you. But it was — this conveyance was made with the actual intent to hinder and delay these future creditors. That was the reason you did it. That's the Court's finding. That's the Court's finding today, Mr. Piano. I want you to understand that.

This Court believes that you did that thinking that there was a problem on the horizon, there was a debt that — there was a creditor that was going to get you. You didn't have any debts right then. You had that Jaguar and — like I said, that's not my basis for my ruling today, but it's these future creditors that were going to rear their head. One of them did. And I think — it's this Court's finding that you actually anticipated that creditor. I think you anticipated it.

You had some problems with these representations and warranties that you were making under Section 8-4 of the amended and restated guaranty. Things were so desperate that you were signing whatever you had to sign and that you did [19] sign that and I believe you were worried about it. And I believe that's what prompted you to transfer this house to your wife. You wanted to make sure you had at least some retirement.

You had a shot — this Court knows, you had a shot — you could have been ESPN. That close. That close. But it went down

the tubes, you knew it was going down the tubes, and you wanted to make sure that you and your wife at least had a chance to have a moderately successful retirement. You felt like you were entitled to that. She was entitled to that. I understand that.

And for this future creditor to end up being the bankruptcy trustee on an inside preference that was made nine months before the bankruptcy on a two week loan for payroll — I personally don't know that I would ever have brought the lawsuit. But that trustee up there apparently did his job, convinced the judge that you owed that money back on an inside preference, and he has a judgment against you, and I can't change those facts.

* * *

Supreme Court, U.S.
FILED
OCT 7 1998
OFFICE OF THE CLERK

No. 98-407

In The

Supreme Court of the United States

October Term, 1998

VINCENT C. PIANO, a/k/a Vic Piano
and LOUISE PIANO,

Petitioners,

vs.

ALBERT F. NASUTI, Trustee,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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STATEMENT OF THE CASE

Respondent, Albert F. Nasuti, Chapter 7 Trustee ("the Trustee"), incorporates as his statement of the case the opinion of the Eleventh Circuit Court of Appeals and the Order of the United States District Court, which were attached to the Petition for Writ of Certiorari as Appendices A and C respectively. In addition, the Trustee corrects the following misstatements of fact made by the Petitioners in their statement of the case. Throughout the Petitioners' statement of facts, they falsely portray the state of their indebtedness at the time the fraudulent conveyance occurred. The Petitioners state that they "had no debts," "had no foreseeable future debts," and were not obligated to anyone at the time Mr. Piano transferred his one-half interest in the family home in New York to his wife. These statements are directly contrary to the findings of fact of the bankruptcy court, as affirmed by the district court and the Eleventh Circuit Court of Appeals. All three (3) courts specifically held that Vincent Piano, who faced imminent and severe financial problems, attempted to defeat the claims of known and anticipated creditors by transferring his property to his wife with fraudulent intent.

REASONS FOR DENYING THE WRIT

I.

THIS CASE DOES NOT CONCERN AN IMPORTANT FEDERAL QUESTION.

The issues addressed in the Petition for Writ of Certiorari relate primarily to state law issues, and do not warrant review by the Court. *See Huddleston v. Dwyer*, 322 U.S. 232, 237 (1944) ("ordinarily we . . . do not review, save in exceptional cases, the considered determination of questions of state law

by the intermediate federal appellate courts"). The petition discusses the bankruptcy court's application of New York fraudulent conveyance law. The petition does not present an important federal question for this Court to resolve.

In their first issue, the Petitioners attempt to create a Constitutional issue where none exists. The Petitioners have stated a general principle, making a generic reference to the Fifth Amendment, without identifying any real Constitutional issue for the Court to review. Furthermore, the only legal authority included is a 1932 case from the Surrogate's Court of Kings County, New York, which discusses state law issues. The Petitioners have failed to present an important federal question with their first issue.

On their face, the remaining issues of the petition concern state law issues. The Petitioners request that the Court review the lower courts' interpretation of New York law on fraudulent conveyances. All three (3) lower courts agreed on the interpretation of a clearly decided issue of New York law. The petition does not concern an important federal question.

Finally, the petition does not present a question that is important to the public interest. The facts of this case are unique, the law is decided, and the resolution of this case only affects the parties to the case and those related to the case.

II.

THE PETITION PRESENTS QUESTIONS OF FACT AND THE APPLICATION OF FACTS TO STATE LAW.

The Petitioners seek to challenge the bankruptcy court's finding by clear and convincing evidence that Mr. Piano possessed an actual intent to defraud future creditors when he

transferred his one-half interest in the family home to his wife. The bankruptcy court's findings of fact were affirmed by the district court and the Eleventh Circuit Court of Appeals. Review is not warranted to review the evidence and specific facts of this case. *See Graver Mfg. Co. v. Linde Co.*, 336 U.S. 271, 275 (1949) (stating that the Court "cannot undertake to review concurrent findings of fact by two [in this case three] courts below in the absence of a very obvious and exceptional show of error").

III.

PETITIONERS HAVE NOT RAISED THEIR ALLEGED CONSTITUTIONAL CLAIM IN THE COURTS BELOW.

The Petitioners' first issue purports to be a Constitutional issue under the Fifth Amendment. Whether Mr. Piano had a Constitutional right to transfer his property was not raised below, was never briefed or argued by the parties, and no lower court decided the issue. The Petitioners have merely referred to the Fifth Amendment in an attempt to acquire certiorari. No Constitutional claim was preserved in the lower courts. Thus, the petition should not be granted to review this issue. *See Taylor v. Illinois*, 484 U.S. 400, 406 n.9 (1988) ("a generic reference to the Fourteenth Amendment is not sufficient to preserve a Constitutional claim").

CONCLUSION

Throughout the course of the appellate process, the Petitioners have presented briefs in language virtually identical to briefs submitted to the lower court. They have reproduced that brief here. The Pianos' Petition for Writ of Certiorari does not present any important federal questions. The petition relates to state law issues and questions of fact. For the reasons set forth herein, the Trustee respectfully requests that the Court deny the Pianos' Petition for Writ of Certiorari.

Respectfully submitted,

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VINCENT C. PIANO, a/k/a Vic Piano
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On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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6 pp

STATEMENT OF THE CASE

This is an action springing from an adversary complaint in a Chapter 7 bankruptcy proceeding in which the Trustee alleges, inter alia, that certain transfers of real and personal property made by Mr. Piano to his wife were fraudulent under the United States Bankruptcy Code and New York Debtor and Creditor Law, specifically 276 of New York Debtor and Creditor Law.

Petitioners timely filed their petition for writ of certiorari which was docketed on September 8, 1998. Respondents filed a response in opposition on or about October 7, 1998 objecting to statements of certain facts by the petitioners and raising three separate reasons for denying the writ. Petitioners timely file their reply to the arguments of the respondents.

REASONS FOR GRANTING THE WRIT

I.

THIS CASE CONCERNS AN IMPORTANT FEDERAL QUESTION.

The issues addressed in the Petition for Certiorari warrant review by the Court because they involve federal questions.

As stated in the Petition for Writ of Certiorari, the petition revolves around the Fifth Amendment to the United States Constitution which provides in relevant part: "No person shall . . . be deprived of life, liberty, or property, without due process of law. . . ."

The principle presented by the Petitioner is that an owner of property may dispose of his possessions, if the owner is not obligated to another and any such transfer is not subject to question from any source. *In re Vitelli's Estate*, 261 N.Y.S. 266, 268 (Sur. Ct. 1932).

The bankruptcy court committed error in denying the Petitioner his Constitutionally guaranteed right to dispose of his property at a time when the Petitioner had no debts and no known future creditors.

Finally, this case presents a question important to the public interest because if a person were unable to transfer all of his assets to another person or entity without consideration at a time when he had no debts and no known liabilities then every irrevocable trust would be rendered invalid. Thus, the facts of this case are not unique and affects more than the parties to this case.

Further, if the case before the Court were allowed to stand as the law of the land, then all "future" creditors could use the case as precedent to reach back in time and set aside every transfer of assets that deprived them of payment. In the case of an irrevocable trust, what would prevent a future creditor such as the internal revenue service from invading the trust at will? Any future creditor would no longer be bound by the present assets of the creditor but could instead take account of the prior worth of the creditor comfortable in the knowledge that prior transfers could be set aside. No financial planner or estate attorney or tax attorney or accountant could rely upon the long standing principles set forth in the United States Constitution granting every person the right to freely dispose of his property. This case stands firmly for the principle that an unknown and unanticipated future creditor may set aside a prior lawful transfer of assets by a person solvent at the time of the transfer. There are few Federal questions rising to greater importance than the property rights of every person in this country.

II.

THIS CASE PRESENTS QUESTIONS OF LAW AND OBVIOUS AND EXCEPTIONAL ERROR WAS PRESENT IN THE COURTS BELOW.

This case presents a question of law as to the court's interpretation of the § 276 of the New York Debtor and Creditor Law under the Constitution of the United States.

Under the Rule 10 of The Rules Of The Supreme Court Of The United States, the Court may grant Certiorari when

> a United States court of appeals has . . . so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power.

S. Ct. Rule 10.

Here, the lower courts have departed from the usual course of judicial proceedings as more fully explained in Parts II, III, and IV of the Petition for Writ of Certiorari. Furthermore, the errors as described in the petition are obvious and exceptional.

Graver Tank & Mfg. Co., Inc. v. Linde Air Products Co., 336 U.S. 271, relied upon by respondent is inapposite. In Graver, The court reasoned that the "clearly erroneous' standard was especially applicable because the evidence there was primarily expert testimony. Here, the issues presented are questions of law, not scientific demonstrations.

III.

PETITIONERS HAVE RAISED THE CONSTITUTIONAL CLAIM IN THE COURTS BELOW.

Petitioners have sufficiently presented a constitutional claim based on the Fifth Amendment to the United States Constitution in the courts below.

Here, petitioner has described the fundamental right at issue and the courts below understood the constitutional question presented. The petitioners have consistently raised the following issue throughout:

> Whether it is one of the most primary principles of property law that an owner thereof is entirely at liberty to dispose of any part or all of his possessions, either gratuitously or otherwise, at a time when he is not obligated to another and any such transfer is not subject to question from any source, the Court committed error in denying the debtor his constitutionally guaranteed rights to dispose of his property.

Specifically, Petitioners raised the identical issue stated as issue number sixteen in the appeal to the United States District Court for the Northern District of Georgia, and then repeated it as issue number seven in the appeal to the United States Circuit Court for the Eleventh Circuit. *See Taylor v. Illinois*, 484 U.S. 400 (1988). Furthermore the fundamental right at issue was raised at the commencement of each memorandum supporting the respective appeal, and was cited in closing throughout each memorandum as follows:

> If a person were unable to transfer all of his assets to another person or entity without consideration at a time when he had no debts and no known liabilities then every irrevocable trust would be rendered invalid.

Thus, this case would be properly before the United States Supreme Court upon its grant of certiorari to consider the federal constitutional issues presented.

CONCLUSION

The issues addressed in the Petition for Certiorari warrant review by the Court because they involve federal questions based on the Fifth Amendment to the United States Constitution. Furthermore, Petitioners have sufficiently presented this constitutional claim in the courts below. Finally, this case is proper for certiorari because this case presents a question of law and the lower courts have departed from the usual course of judicial proceedings.

Respectfully submitted,

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